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In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WYMAN-GORDON COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–12a) is not yet officially reported. The opinion of the district court (R. 118–124) [1] is reported at 270 F. Supp. 280. The decision of the Board's Regional Director, out of which the instant case arises (R. 11–13), is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1968 (App. B, p. 13a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the record appendix, a copy of which has been filed along with the petition.

QUESTIONS PRESENTED

1. Whether the requirement that employers must furnish the National Labor Relations Board with the names and addresses of the employees eligible to vote in a representation election—information which the Board makes available to the contestants in the election—is invalid because the agency promulgated it in an adjudicatory proceeding rather than under the rule-making procedures of the Administrative Procedure Act.

2. If the first question is answered negatively, whether, where an employer refuses to furnish such information, the Board may compel its production through a proceeding in a federal district court.

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix D, *infra*, pp. 34a–39a.

STATEMENT

In *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966),[2] the Board decided that, in future representation election cases, an employer would be required to file with the Board's Regional Director, prior to the conducting of the election, a list of the names and addresses of the employees eligible to vote therein, and that the Regional Director would then make the list available to all contestants in the election.[3] The

[2] The Board's opinion in *Excelsior* is set forth at R. 14–32, and, for the Court's convenience, in Appendix C, *infra*, pp. 14a–33a.

[3] Before reaching its decision in *Excelsior*, the Board obtained the views of leading employer and union groups, which filed briefs and presented oral argument, as *amici curiae* (R. 17–18; App. C, pp. 17a–18a.

instant case grows out of respondent Company's refusal to comply with the *Excelsior* requirement.

On July 13, 1966, the International Brotherhood of Boilermakers filed a petition, pursuant to Section 9(c)(1) of the Act, seeking to represent the Company's employees at its plants in Worcester, North Grafton, and Millbury, Massachusetts (R. 9). The United Steelworkers of America intervened in the proceeding (R. 11). After investigation and hearing, the Board's Regional Director directed that an election be held in a unit consisting of the approximately 1750 production and maintenance employees at the three plants (R. 12–13). The Regional Director further directed the Company to furnish, prior to the election, a list of the names and addresses of the eligible voters, as required by the Board's *Excelsior* decision (R. 13, n. 3).

The Company notified the Regional Director that it would not furnish the list; the election was held without it, and the unions lost; they filed objections to the election based on the Company's refusal to furnish the list (R. 33–36). The Regional Director upheld the unions' objections, set aside the first election, and directed that another election be held; the Board sustained this action (R. 37–38, 39). The Regional Director again directed the Company to furnish the list (R. 40–41).

When the Company again refused, the Regional Director, pursuant to Section 11(1) of the Act, issued a subpoena *duces tecum* requiring the Company to produce its books and records showing the names and addresses of the employees eligible to vote in the elec-

tion, or, in lieu thereof, a list containing that information (R. 42–43). The Company moved to quash the subpoena; the Board denied the motion (R. 44–46, 47). When the Company still refused to comply with the subpoena, the Board brought an action in the United States District Court for the District of Massachusetts to enforce the subpoena, or, alternatively, for a mandatory injunction directing the Company to comply with the *Excelsior* requirement (R. 2–7).

The district court found that the *Excelsior* requirement was a valid exercise of the Board's statutory authority and was properly promulgated in an adjudicatory rather than a rule-making proceeding, and enforced the subpoena (R. 118–124). The court of appeals (with one judge dissenting) reversed. Although the court characterized the *Excelsior* requirement as one "to which we see little or no objection and for which there is much to be said" (App. A, p. 5a), it held the requirement invalid because it was not promulgated in accordance with the requirements prescribed for rulemaking proceedings in Section 4 of the Administrative Procedure Act (5 U.S.C. 553).

REASONS FOR GRANTING THE WRIT

1. The holding of the court of appeals that the Board could adopt its *Excelsior* requirement only by following the formal rule-making procedures of the Administrative Procedure Act conflicts with this Court's decision in *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, and other cases defining the authority of administrative agencies to promulgate new principles in adjudicatory

proceedings; and rests upon a basic misinterpretation of the requirements of that Act.

a. In *Chenery*, this Court upheld a new rule which the Securities and Exchange Commission had promulgated in an adjudicatory proceeding under the Public Utilities Holding Company Act of 1935. The rule in effect barred management from trading in the securities of a company during its reorganization by limiting the participation of such securities under the reorganization plan to the amount the management had paid for them. The Court rejected the contention that the Commission was precluded from thus announcing and applying a new principle in an adjudicatory proceeding and could only "promulgate a general rule outlawing such profits in future utility reorganizations" (332 U.S. at 199–200). It pointed out (*id.* at 202) that "any rigid requirement" that the agency must perform "[t]he function of filling in the interstices of the Act * * * through this quasi-legislative promulgation of rules to be applied in the future * * * would make the administrative procedures inflexible and incapable of dealing with many of the specialized problems which arise"; that since "the agency must retain power to deal with the problems on a case-by-case basis if the administrative procedure is to be effective, [t]here is thus a very definite place for the case-by-case evolution of statutory standards" (*id.* at 203); and it concluded that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency" (*ibid.*).

See, also, *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 371; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 421.

The Board did not abuse its "informed discretion" in promulgating the *Excelsior* requirement in an adjudicatory rather than a formal rule-making proceeding. There was no unfairness in announcing the new principle in that decision. The Board gave interested labor and management groups the opportunity to participate in the proceeding as *amici curiae*, and some of them did submit their views; and the agency fully explained its reasons for adopting the principle and rejecting the objections thereto.

Indeed, the propriety of the Board's promulgation of the *Excelsior* requirement in an adjudicatory proceeding is *a fortiori* in light of *Chenery*. For in that case the probable effect of the Commission's ruling was "retroactively [to] prevent [the] management from securing the profits and control which were the objects of the preferred stock purchases" (332 U.S. at 203), even though the management was not on notice when it made the purchases that they were illegal. In the present situation, on the other hand, the *Excelsior* requirement was made prospective in operation, in order "to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated" (App. C, p. 20a, n. 5; R. 20, n. 5); and it had been in effect for seven months when, in this case, the Regional Director initially directed the Company to furnish the information (R. 3) and for more than fifteen months when the district court so ordered (R. 124–125). Thus, contrary

to the view of the court of appeals (App. A, pp. 4a–5a), the fact that the Board, unlike the Commission in *Chenery*, did not apply its newly announced rule to the parties to that case makes this an even stronger case than *Chenery* for upholding the agency's right to announce such a principle in an adjudicatory proceeding. Administrative agencies, no less than courts,[4] have the authority to apply prospectively new principles announced in adjudicatory decisions. See *National Labor Relations Board* v. *A.P.W. Products Co.*, *supra*, 316 F. 2d 899, 905–906 (C.A. 2); *Leedom* v. *International Brotherhood of Electrical Workers*, 278 F. 2d 237, 239–241 (C.A.D.C.); *City of Chicago* v. *Federal Power Commission*, 385 F. 2d 629, 642–643 (C.A.D.C.); *Safarik* v. *Udall*, 304 F. 2d 944, 949–950 (C.A.D.C.), and authorities cited in nn. 3 and 4.

Other courts of appeals consistently have recognized the Board's broad discretion to establish new policies and principles through decision in particular cases rather than by rulemaking. For example, in *National Labor Relations Board* v. *A.P.W. Products Co.*, *supra*, the Second Circuit sustained the Board's action in enunciating, in an adjudicatory proceeding, a reversal of its prior practice of tolling back pay for the period between the trial examiner's proposed dismissal of an unfair labor practice charge and the Board's decision to the contrary. The court pointed out (316 F. 2d at 905):

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[4] See, *e.g.*, *Linkletter* v. *Walker*, 381 U.S. 618, 622–629; *James* v. *United States*, 366 U.S. 213, 221–222; *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 364.

> * * * [M]uch can be and has been said in favor of an agency's invoking the rule-making procedure when it wants to make rules. * * * But our question is not of wisdom but of authority. Congress cannot have been blind to the fact that the adjudicative process of the agencies, like that of the courts, gives birth to "rules," which may apply for the past, for the future, or, more generally, for both. * * * The short of it would seem to be that when an administrative agency makes law as a legislature would, it must follow the rule-making procedure prescribed in § 4 [5 U.S.C. 553], and when it makes law as a court would, it must follow the adjudicative procedure prescribed in §§ 5, 7 and 8 [5 U.S.C. 554, 556, 557]; whether to use one method of law making or the other is a question of judgment, not of power. * * *

To like effect, see *National Labor Relations Board* v. *Penn Cork & Closures, Inc.*, 376 F. 2d 52, 57 (C.A. 2), certiorari denied *sub nom. District Lodge No. 15, etc.* v. *National Labor Relations Board*, 389 U.S. 843; *National Labor Relations Board* v. *E & B Brewing Co.*, 276 F. 2d 594, 598 (C.A. 6), certiorari denied, 366 U.S. 908; *National Labor Relations Board* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167, 174 (C.A. 4), certiorari denied, 361 U.S. 943; *Optical Workers' Union Local 24859* v. *National Labor Relations Board*, 227 F. 2d 687, 691 (C.A. 5), certiorari denied, 351 U.S. 963. See also Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 926–927 (1965).

In *Howell Refining Co.* v. *National Labor Relations Board*, C.A. 5, No. 24802, decided August 12, 1968,

the Fifth Circuit recently stated its disagreement with the present case.[5] In upholding the *Excelsior* rule as "a valid exercise of the Board's power to ensure employees a fair and free choice in the selection of their representative" (App. E, p. 45a), the court noted in a footnote that although the employer had not raised the point, the First Circuit had invalidated the *Excelsior* rule "because of the manner of its adoption," but that it took "a different view of the matter and decline[d] to follow the *Wyman-Gordon* case" (App. E, p. 45a, n. 8).

b. The significance of the court of appeals' error is increased by the fact that three other courts of appeals have upheld the Board's *Excelsior* requirement on the merits. *Howell Refining Co.* v. *National Labor Relations Board, supra; National Labor Relations Board* v. *Hanes Hosiery Division,* 384 F. 2d 188 (C.A. 4), certiorari denied, 390 U.S. 950; *National Labor Relations Board* v. *Rohlen,* 385 F. 2d 52 (C.A. 7). As noted, the Fifth Circuit in *Howell* expressly disapproved the present case; the two other courts, however, apparently did not consider whether the Board's adoption of the *Excelsior* principle in an adjudicatory proceeding affected its validity. Thus, the effect of the decision below is that the *Excelsior* requirement is applicable to representation elections conducted in the Fourth, Fifth and Seventh Circuits but not to those conducted in the First Circuit. The Board conducts a large number of representation elections[6]

[5] Pertinent excerpts from the *Howell* opinion are reprinted in Appendix E, *infra*, pp. 40a–45a.

[6] During the fiscal year ended June 30, 1967, the Board conducted more than 8,000 representation elections. *Thirty-second Annual Report of the NLRB*, p. 234 (G.P.O. 1968).

and the governing rules therefor should be uniform throughout the country. The decision below has created uncertainty in this important area of labor law, and prompt resolution of the issue by this Court is desirable.[7]

c. The court of appeals further erred in its assumption that the Administrative Procedure Act requires that all administrative proceedings involving the prescription of rules of general applicability must be conducted in accordance with the procedures that Act specifies for formal rulemaking. Although the Act prescribes different procedures for rulemaking and adjudication,[8] it does not state when one rather

[7] The validity of the *Excelsior* requirement is at issue in cases presently pending before the courts of appeals of three other circuits. *Beech-Nut Life Savers, Inc.* v. *National Labor Relations Board*, No. 32,002, C.A. 2, on appeal from 274 F. Supp. 432 (S.D.N.Y.); *British Auto Parts* v. *National Labor Relations Board*, No. 21,883, C.A. 9, on appeal from 266 F. Supp. 368 (C.D. Cal.). *Teledyne, Inc.* v. *National Labor Relations Board*, No. 22,354, C.A. 9, on appeal from 66 LRRM 2408 (N.D. Cal.); *National Labor Relations Board* v. *Q-T Shoe Mfg. Co.*, No. 17,203, C.A. 3, on appeal from 67 LRRM 2356 (D. N.J.). There is no occasion, however, for this Court to await the outcome of those cases. The considerations bearing on the validity of the *Excelsior* requirement and the propriety of its adoption in an adjudicatory proceeding have been fully considered in the cases already decided. Moreover, whatever conclusions the other courts reach would not eliminate the existing inconsistency in result among the four circuits that have passed on the *Excelsior* requirement.

[8] The Act specifies the following steps for the promulgation of a formal rule: (1) general notice of the proposed rulemaking must be published in the Federal Register, unless persons subject thereto have actual notice thereof; (2) interested persons must be given an opportunity to submit their views on the proposed rule; and (3) after consideration of the relevant

than the other procedure is to be followed. The rule-making procedure thus need be utilized only when the agency elects to act by promulgating a formal rule.[9] Here, of course, the Board did not elect so to proceed, and the Act's requirements for formal rulemaking accordingly were inapplicable.

2. If the Court agrees that the *Excelsior* requirement was validly promulgated, a further question is presented: whether the Board may properly enforce that requirement by a suit in a federal district court. Although the court of appeals did not reach that issue, we believe it would be appropriate for this Court to decide it, in order to put an end to the increasing volume of litigation that has developed over the *Excelsior* principle. Rather than argue this point now, we simply note that the Fourth Circuit in *Hanes* held that the Board had power to enforce the *Excelsior* requirement either through a subpoena enforcement proceeding under Section 11(2) of the National Labor Relations Act, or by a suit in a district court

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matter presented, the agency must incorporate in the rules "a concise general statement of their basis and purpose" and publish them in the Federal Register at least 30 days before their effective date (5 U.S.C. 552, 553). The procedure for "adjudication" provides for the typical adversary proceeding—notice of the issues, responsive pleading, an opportunity to submit evidence before a hearing officer, and decision (5 U.S.C. 554, 556, 557).

[9] The Act expressly makes the rule-making procedure inapplicable to the adoption of merely procedural rules. See 5 U.S.C. 552(a)(1)(D), 553(b)(3)(A). For the reasons set forth by Judge Coffin in his dissenting opinion (App. A, pp. 7a–12a), it is our view that the *Excelsior* requirement is exempt from the formal rule-making requirements of the Act because it is a "procedural," rather than a "substantive," rule.

for a mandatory injunction under 28 U.S.C. 1337; and that the Seventh Circuit in *Rohlen*, without passing on the latter alternative, agreed that a proceeding under Section 11(2) would lie.[10] We believe that either procedure may be used.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
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AUGUST 1968.

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[10] Judge Coffin, in his dissent in the present case, stated that the *Excelsior* requirement was enforceable by injunctive suit (App. A, pp. 11a–12a).

U.S. GOVERNMENT PRINTING OFFICE: 1968

APPENDIX A

United States Court of Appeals For the First Circuit

No. 7000

WYMAN-GORDON COMPANY ET AL., APPELLANTS

v.

NATIONAL LABOR RELATIONS BOARD, APPELLEE

Appeal from the United States District Court for the District of Massachusetts

[270 F. Supp. 280]

Before ALDRICH, *Chief Judge,* MCENTEE and COFFIN, *Circuit Judges.*

June 12, 1968

ALDRICH, *Chief Judge.* This is an appeal from an order of the district court enforcing compliance with a National Labor Relations Board subpoena which ordered an employer to furnish names and addresses to its employees. The issuance of the subpoena stems from efforts of two unions, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (Boilermakers), and the United Steelworkers of America, AFL-CIO (Steelworkers), to represent some 1750 production and maintenance employees at appellant's plants in three Massachusetts communities. The

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Board's Regional Director, after investigation and hearing, ordered an election and directed appellant, in accordance with the rule announced in *Excelsior Underwear, Inc.*, 1966, 156 N.L.R.B. 1236, to furnish the Board a list of the names and addresses of all employees eligible to vote. Appellant agreed to furnish a list of names, but refused to supply addresses. Notwithstanding this refusal, the election was held, resulting in 226 votes for the Boilermakers, 555 for the Steelworkers, and 903 against any union.

On objection by both unions, the regional Director set aside the election and ordered a new one. The Board affirmed this decision. Again the Regional Director demanded an *Excelsior* list, and again appellant refused. The subpoena then issued. The Board filed a complaint seeking enforcement of the subpoena or, alternatively, a mandatory injunction directing appellant to comply with the *Excelsior* requirement. The district court ordered enforcement of the subpoena, and this appeal followed. By it appellant has launched a broadside attack against the *Excelsior* rule, challenging its substance, the procedure of its promulgation, and the statutory basis of the supoena power invoked to enforce it.

The court is of one mind in not being greatly impressed by the arguments challenging the wisdom of the *Excelsior* rule, but this is a matter on which the majority of the court does not feel called upon to make a decision. We mention briefly the Board's concern in insuring an informed employee electorate, and in balancing management's right of access to employees in the plant through the mails with a right on the part of unions—and antiunion employees—to have access to the addresses of a constantly changing roster of employees. It is unnecessary to repeat the Board's responses in *Excelsior* to the contentions that

its authority to compel diclosure is limited to cases where other channels of information do not exist and that such compulsory disclosure invades the privacy of employees. Likewise we are not greatly impressed by the contention that compelling a list of names and addresses forces appellant to "interfere" with a labor organization, in violation of 29 U.S.C. § 158(a)(2), and to give a "thing of value" to a labor organization, in violation of 29 U.S.C. § 186. The former statute, as is indicated by the cases cited to us by appellant, is concerned with acts of favoritism. It is difficult to think that supplying the Board with information, pursuant to a Board order, which the Board will give to all persons alike who show a legitimate interest, would be considered a proscribed gift.

A threshhold question, however, is raised by appellant's claim that the *Excelsior* rule is invalid because concededly, it was promulgated in disregard of the notice and publication requirements of the Administrative Procedure Act, 5 U.S.C. §§ 552, 553.[1] In the opinion of the majority of the court this issue is determinative.

Events leading to the establishment of the rule grew out of two consolidated cases coming before the Board on union challenges of elections on the ground that the employers had refused to supply the union with lists of names and addresses of employees so that the unions might answer a campaign letter sent by the company to the employees. Recognizing the problem to be one affecting more than just the parties before

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[1] We are not here concerned with the effect of failure to publish rules, themselves properly arrived at, in compliance with 5 U.S.C.A. § 552(a)(1). In this respect we agree with the views of Judge Friendly speaking for the court in *United States* v. *Aarons*, 2 Cir., 1962, 310 F. 2d 341, 347–48, that such rules are valid as against one with actual notice of them. See 1 Davis, Administrative Law § 6.10 (1958).

it, the Board chose to solicit the assistance of selected amici curiae, and, ultimately, to establish a rule which not only did not apply to the parties before it, but did not take effect for thirty days.[1] In so doing we consider that the Board, to put it bluntly, designed its own rulemaking procedure, adopting such part of the Congressional mandate as it chose, and rejecting the rest.

In presently justifying its position the Board does not seek to carve out for itself the special defense suggested by our brother Coffin in dissent, but asserts that what it did was proper administrative action approved by the Court in *SEC* v. *Chenery Corp.*, 1947, 332 U.S. 194. It is, of course, true that the Court there recognized that an adjudicatory administrative body may promulgate rules through decision as well as through more formal rule-making procedures. This is a necessary and inevitable consequence of adjudication. Normally the Board must decide cases between party and party, as the Commission did in *Chenery*. The result, if stare decisis is to mean anything, is that any principle, once decided, stands as a guide for the future and may be spoken of as a rule. Examples are legion. Sometimes, until the Board spoke, all parties may have thought the "rule" was the other way. This may be unfortunate, but it is normally unavoidable, as *Chenery* demonstrates.

In *Excelsior*, however, the Board did not decide a case between party and party, or, more exactly, it decided a case one way, and took occasion to lay down a future rule the other way. *Chenery* in no fashion, suggests approval of this. On the contrary, to the extent the Board was not deciding a case, this is precisely

[1] Thirty days is the period which must elapse between publication and effective date of a rule promulgated in accordance with APA procedures. 5 U.S.C.A. § 553(d).

where Congress had instructed it as to the procedure it should adopt. The Board has chosen to disregard Congress.

Although the first time in this circuit, this is neither the first nor the most severe instance of Board action approximating contravention of the APA in this manner. It has been long and severely criticized, *e.g.*, Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729 (1961); 1 Davis, Administrative Law § 6.13 (Supp. 1967), with no apparent effect. We regret that the matter comes before us in connection with a rule to which we see little or no objection and for which there is much to be said. Yet, to blink at this procedure in this instance because we may approve of the result, we believe would be neither honest nor wise.[3] Congress provided no exception in the APA for rules improperly promulgated, but which some court, in a case between the agency and some individual, was persuaded were sound. To recognize such an exception would be to emasculate the statute.

We read Judge Coffin's dissent as disagreeing on this matter only in that he believes the rule promulgated to be "procedural" within the APA definition and therefore not subject to the requirement that advance notice of the intended rulemaking, and the substance of the rule, be given and that interested parties be afforded an opportunity to comment. 5 U.S.C.A. § 553. If the rule related simply to the me-

[3] We are not unmindful that two circuits have supported the *Excelsior* rule. *NLRB* v. *Rohlen*, 7 Cir., 1967, 385 F. 2d 52; *NLRB* v. *Hanes Corp.*, 4 Cir., 1967, 384 F. 2d 188, *cert. denied* 390 U.S. 950. However, so far as appears, the Board's failure to comply with the APA was not brought to the court's attention. The courts were concerned with whether the substance of the rule was within the Board's rule-making power, not whether it was properly adopted.

chanics of conducting an election, to superintending or checking the voters, we would agree. The *Excelsior* opinion makes the suggestion that this is one of the purposes. 156 N.L.R.B., *supra,* at 1242–43. However, the Board's decision effectively contradicts its own declaration. The Board already had a valid rule requiring the employer to furnish a checklist. The additional requirement of the *Excelsior* rule is expressly stated not to apply when the time interval is "too brief . . . for the union to be able to make any meaningful use of this information." *Id* at 1242, fn. 14. We can only conclude that *Excelsior's* purpose is what it appears to be on its face, a provision requiring the employer to furnish interested parties with affirmative assistance in conducting their election campaigns.

Such assistance is substance, not Board procedure. It differs only in degree and not in kind from a requirement, for example, that an employer having an assembly hall or a printing press should make it available to groups requesting it. The Board's contentions that furnishing a mailing list is not expensive or seriously burdensome, or is required only because the union has no effective substitute, may well be justifications for the rule, but they do not change its character. Judge Coffin's emphasis on the relative lack of burden, and comparing the compilation of the list with affording space on a bulletin board, suggests factual determinations in each case that seem to us unnecessary at best. His desire to resolve questions of doubt in favor of a procedural label loses importance to us when one considers that its only purpose is to avoid affording interested parties an opportunity to present their views as to what is, quite apparently, a controversial rule.

It is also true that compliance with the rule may well increase the fairness of the election. This, how-

ever, is a conclusory argument. Many actions by the employer may add to the fairness of the election. This does not mean that ordering them to be done is procedural. We are particularly unmoved by our brother Coffin's suggestion that the fact the rule sets up a positive as distinguished from a negative requirement is indicative that it is not substantive.

THE JUDGMENT OF THE DISTRICT COURT IS SET ASIDE AND THE COURT IS ORDERED TO DISMISS THE COMPLAINT

COFFIN, *Circuit Judge* (dissenting): For the purpose of deciding the applicability of the notice provision of the Administrative Procedure Act, 5 U.S.C.A. § 1003(a), I view the *Excelsior* rule as procedural and thus valid despite absence of advance notice. I recognize that this is a ground not relied on by the Board, which seemed to assert a standard defense to a standard assault. But the same shoe fits both parties, for the distinction which divides this court was obviously far from the concern of appellant, which said in its brief, ". . . it is clear the Board recognized that it was establishing a new rule or procedure in the conduct of election proceedings under Section 9 of the Act."

The legislative history suggests to me that in grey areas doubt about the nature of a rule should be resolved in favor of applying the procedural label. In the first place, the few attempts to define terms equate substantive rules with "rules issued pursuant to statutory authority to implement statutory policy, as by fixing rates or defining standards", Attorney General's Manual on the A.P.A. (1947) 13 n. 5, or with rules "other than organizational or procedural . . . which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission pursuant to . . . 15 U.S.C. 78n." Man-

ual, *supra* at 30. I read the language and these examples as giving restrictive rather than expansive meanings to "substantive rule".

In addition, the Senate Committee on the Judiciary made clear that in exempting procedural rules from the notice requirement it was seeking to encourage such rules because "those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned." Legis. Hist. of the A.P.A. (1946), 18, 313.

The *Excelsior* rule itself seems to me to be clearly on the procedural side. It sets up a positive requirement of furnishing addresses as well as names of employees, to be applicable in every election. In this respect it differs from the proscription of selectively directed acts of coercion which are more appropriately accomplished through the unfair labor practice procedures.

That the requirement looks toward action the effect of which reaches beyond relations between a party and the Board ought not to be a controlling consideration, any more than it is with reference to the requirement in 29 C.F.R. § 101.19 (the Board's "Statements of Procedure" governing elections) that elections "be adequately publicized by the posting of official notices in the establishment. . . ." Indeed, the natural home of the *Excelsior* rule would seem to be in § 101.19.[4]

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[4] All of this only refers to the primary objective of *Excelsior*, to achieve better elections. The fact that a secondary purpose, the expeditious handling of challenges of voter eligibility, is uncontrovertedly procedural is an added factor of some significance. While a procedural secondary rule could not save a rule otherwise clearly substantive, it would seem that a primary purpose of ambiguous effect might be aided, insofar as notice is concerned, by such a secondary purpose.

It is also, I think, a factor of relevance to the substance vs. procedure issue that the burden on the employer's time, efforts, or property in being compelled to furnish addresses of employees is inconsequential. I do not share the court's conclusion that this requirement "differs only in degree and not in kind" from one that would force an employer to make an assembly hall available on request. I would say that we are dealing with a dichotomy where difference in degree can result in a difference of kind or difference in categorization. This, I think, is illustrated by the above noted procedural requirement that notices of election be posted "in the establishment"—in itself a minimal encroachment on the employer's domain.

While it may be that forcing employers to share with unions their previous monopoly on knowledge of addresses may have a net result of strengthening union power generally, such a result cannot be said to alter substantive "rights" unless the employer's prior easy access to addresses rises to the dignity of a right. *Cf. Sibbach* v. *Wilson,* 312 U.S. 1, 14 (1941). Moreover, the *Excelsior* rule by its terms applies to "all parties"—which include employees hostile to a new union or seeking decertification of an old one. *Cf. Wallace Murray Co.,* 1968-1 CCH NLRB Dec. ¶ 22,256.

I would, for the above reasons, hold that the *Excelsior* rule was valid. But this would not have been an end to the case. There remains the difficult question—how, if at all, can *Excelsior* be properly enforced?[5] The district court ordered that the subpoena be honored. The Board's power lies in the statutory

[5] While what follows goes beyond the issue which divides the court, the writer feels obliged to explore the problem of enforcement which has led to conflicting and often strained statutory interpretation.

language granting "the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. . . ." 29 U.S.C.A. § 161(1).

The authorities which have upheld the subpoena power as available to procure an *Excelsior* list[6] have defined the proceedings leading to representation certification as an investigation and have tortured the concept of "evidence" into something which is helpful in "facilitating a fully informed electorate". *NLRB* v. *Rohlen, supra* at 57. A scrutiny of 29 U.S.C.A. § 161 yields the impression that "evidence" is used throughout in its more traditional sense as data relevant to the proof of a fact in issue.[7] I am sympathetic with the courts which have not been willing to make this leap. *NLRB* v. *Q–T Shoe Co.*, Civil No.

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[6] *NLRB* v. *Rohlen*, 385 F. 2d 52 (7th Cir. 1967); *NLRB* v. *Hanes Corp.*, 384 F. 2d 188 (4th Cir. 1968), *cert. denied* March 4, 1968; *NLRB* v. *British Auto Parts*, 266 F. Supp. 368 (C.D. Cal. 1967); *Swift* v. *Solien*, 56 CCH Lab. Cas. ¶ 12140 (E.D. Mo. 1967); *NLRB* v. *Teledyne, Inc.*, 56 CCH Lab. Cas. § 12229 (N.D. Cal. 1967); *NLRB* v. *Beech-Nut, Inc.*, 56 CCH Lab. cas. ¶ 12237 (S.D. N.Y. 1967).

[7] A similar approach would be to define more narrowly the particular "investigation" as the quest for the names and addresses of the employees. With this frame of reference, the list of such names and addresses could be considered more traditionally as "evidence" relevant to the proof of the object of the investigation. Indeed the subpoena served on appellant contemplated a hearing before the Regional Director at which appellant's president was to testify from corporate books and records concerning the names and addresses of employees. In lieu of such books, a list would be received but only after Board agents had "verified its contents by examination of the subpoenaed books and records." In short, the list is arguably evidence tending to establish the true names and addresses being sought. The difficulty with this approach is that it tortures the word "investigation" into something quite different from its use in 29 U.S.C.A. § 159.

140-67 (D. N.J., filed Jan. 19, 1968); *NLRB* v. *Montgomery Ward, Inc.*, 54 CCH Lab. Cas. ¶ 11659 (M.D. Fla. 1967).

A second solution, suggested by *Q-T Shoe Co.*, *supra*, is that the only way to enforce the *Excelsior* rule is first to secure a determination that refusal by an employer to provide a list of names and addresses of employees constitutes an unfair labor practice under 29 U.S.C.A. § 158(a)(1), and then to seek the aid of the court under 29 U.S.C.A. § 160(e). This would seem plausible until the statutory definitions of unfair labor practices are examined. The Board in *Excelsior* wisely refrained from saying whether refusal to disclose names and addresses of employees would constitute "interference, restraint, or coercion" within the meaning of 29 U.S.C.A. § 158(a)(1). I would say that it is at least doubtful that any one of the effective verbs would cover such a case. "Interfere" is the most adaptable, but its entire thrust is aggressive, not passive. According to Webster's International Dictionary (3d int. ed. 1961), it means such things as "intervene", "intermeddle", and "interpose".

It cannot be said with assurance that a refusal to respond to the *Excelsior* rule—unless, perhaps, a repeated refusal—would predictably be denominated an unfair labor practice.[8] Moreover, constant litigation would ensue over the issue whether, in a given case, the refusal to provide a list had any effect at all on the representation proceeding. For example, in the case at bar appellant moved to quash the subpoena, citing as one ground that the unions already had employee mailing lists.

This leads to the remaining mode of enforcing the rule, if indeed there is any way at all. This is the in-

[8] I would add that I would prefer some lesser sanction for enforcement of procedural rules than that stemming from an unfair labor practice proceeding.

junction. The Congress has indicated by statute that the Board has authority to prescribe "regulations and rules of decision" governing consent elections, 29 U.S.C.A. § 159(c)(4). The Supreme Court has made it clear that "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly . . . [are] matters which Congress entrusted to the Board alone." *NLRB* v. *Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940).

While there is a step between statute and rule, not present in *United States* v. *Feaster*, 330 F.2d 671 (5th Cir. 1964), I see no difference in principle. If, in *Feaster*, the statutory right to have access to books and records supported an injunction compelling access to names, addresses, and job classifications of employees, so here a rule predicated on statutory authority to regulate elections and carrying out Congressional policy should support the same remedy. Or, to go back to the observation in *Walling* v. *Brooklyn Braid Co.*, 152 F.2d 938, 941 (2d Cir. 1945), we should "consider whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted."

Assuming, therefore, the validity of the *Excelsior* rule, I see no other certain way in which it can be enforced than by injunction. And while the absence of other remedy is no adequate justification for judicial invention, I feel that enforcement of the rule lies well within the equity powers of the district court. I would therefore remand the case for consideration of the Board's alternative prayer for an injunction.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 7000

WYMAN-GORDON COMPANY ET AL., DEFENDANTS, APPELLANTS

v.

NATIONAL LABOR RELATIONS BOARD, PLAINTIFF, APPELLEE

JUDGMENT

June 12, 1968

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is set aside and the case is remanded with directions to dismiss the complaint.

By the Court:

(S) ROGER A. STINCHFIELD,
Clerk.

APPENDIX C

United States of America Before the National Labor Relations Board

Case No. 11–RC–1876

EXCELSIOR UNDERWEAR INC. AND SALUDA KNITTING INC., EMPLOYER[1]

and

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO, PETITIONER

Case No. 21–RC–8955

K. L. KELLOGG & SONS, EMPLOYER[2]

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 3, AFL–CIO, AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, AFL–CIO, JOINT PETITIONERS

Decisions and Certifications of Results of Elections

In the *Excelsior* case, pursuant to a Stipulation for Certification upon Consent Election, an election by secret ballot was conducted by the Regional Director for Region 11 on December 6, 1963, among the em-

[1] Referred to herein as the *Excelsior* case.

[2] Referred to herein as the *Kellogg* case.

ployees in the unit described below. After the election, the parties were furnished with a tally of ballots which showed that of approximately 247 eligible voters, 246 cast ballots, of which 35 were for, and 206 against, the Petitioner, and 5 challenged. The challenges were insufficient in number to affect the results of the election. The Petitioner filed timely objections to conduct affecting the results.

The objections, as summarized by the Regional Director, related to the following:

(1) The Employer's conduct on November 29 in mailing to all employees an 8-page letter allegedly containing material misstatements as to Union dues and initiation fees, as well as provisions of the National Labor Relations Act, threats of plant closings, strikes and violence, and a predetermined position of refusing to bargain in the event the Union were to be selected as bargaining representative.

(2) The Employer's conduct in refusing to supply the Union with a list of employees and their addresses for the purpose of allowing the Union to answer the letter referred to in Objection No. 1.

(3) The Employer's conduct on or about December 4, in posting a notice at its plants materially misrepresenting Union officials' salaries.

(4) The Employer's conduct on December 5, in giving a speech to employees on Company time containing promises of benefit if the employees did not select the Union as their bargaining representative.

(5) The conduct of certain townspeople of Saluda, South Carolina, in speaking to groups of employees on December 3 and 4, and informing them that other companies interested in relocating in Saluda, South Carolina, would not do so if the Union were selected as bargaining representative. Said townspeople allegedly

also stated that Union representatives were Communistic and did not believe in God.

After investigation, the Regional Director, on January 10, 1964, issued and served upon the parties his Report and Recommendation on Objections, in which he recommended that the objections be overruled and that a certification of election results be issued. Petitioner filed timely exceptions to the Regional Director's report.

In the *Kellogg* case, pursuant to a Stipulation for Certification upon Consent Election, a mail election by secret ballot was conducted by the Regional Director for Region 21 between May 15, 1964, and May 28, 1964, among the employees in the unit described below. After the election, the parties were furnished with a tally of ballots which showed that of approximately 31 eligible voters, 30 cast votes, of which 9 were for, and 21 against, the Joint-Petitioners. The Joint Petitioners filed timely objections to conduct affecting the results of the election.

Objection No. 1 alleged that the Employer, on or about May 5, 1964, and May 13, 1964, sent to each employee letters containing certain false and coercive material. Objection No. 2 complained of the Employer's denial of the Joint-Petitioners' request for a list of employees' names and addresses so that it would have an opportunity to mail campaign material to those employees.

After investigation, the Regional Director, on July 16, 1964, issued and served upon the parties his Report and Recommendation on Objections, in which he recommended that Objection No. 1 be sustained, Objection No. 2 be overruled, and the election be set aside and a new election directed. The Joint-Petitioners filed

timely exceptions to the Regional Director's recommendation that Objection No. 2 be overruled.[3]

On April 2, 1965, the National Labor Relations Board, having determined that the Employers' denial of the Petitioners' request for the names and addresses of employees eligible to vote in the elections in these two cases presented a question of substantial importance in the administration of the National Labor Relations Act, as amended, ordered that the two cases be consolidated, and that oral argument be heard before the Board on May 20, 1965. The parties were given permission to file further briefs and directed to focus their attention, in briefs and argument, on the following questions:

> I. Can a fair and free election be held when the union involved lacks the names and addresses of employees eligible to vote in that election, and the employer refuses to accede to the union's request therefore?
>
> II. If such information should be made available, should the requirement be limited to situations in which the employer has utilized his knowledge of these names and addresses to mail antiunion letters or literature to employees' homes?
>
> III. If some requirement that the employer make addresses available is to be imposed, how should this be implemented? For example, should such names and addresses be furnished to a mailing service with instructions to mail, at the union's expense, such materials as the union may furnish? Or, should the union be entitled to have the names and addresses?

The Board also invited certain interested parties to file briefs *amicus curiae* and to participate in oral argument. This invitation was accepted by the

[3] The Employer filed timely exceptions to the Regional Director's recommendation with respect to Objection No. 1.

Chamber of Commerce of the United States; American Federation of Labor-Congress of Industrial Organizations; International Union of Electrical, Radio and Machine Workers, AFL–CIO; and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW–AFL–CIO. The National Association of Manufacturers, Retail Clerks International Association, AFL–CIO, and Textile Workers Union of America, AFL–CIO, filed briefs but did not participate in the argument. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America participated in the argument but did not file a brief.

Upon the entire record in each of these cases, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner (Joint-Petitioners in *Kellogg*) is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2 (6) and (7) of the Act.

4(a) In *Excelsior* the parties stipulated, and we find, that all production and maintenance employees, plant clerical employees, and janitors at both the Employer's plants in Saluda, South Carolina, excluding all office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

(b) In *Kellogg* the parties stipulated, and we find, that all drillers, derrickmen, rotary helpers, yardmen, mechanics, and welders, excluding all office clerical

employees, professional employees, truckdrivers, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

5. Exceptions 1, 3, 4, and 5 in *Excelsior* are without merit and hereby rejected.

6. Objection No. 2 in each of these cases poses the question whether an employer's refusal to provide a union with the names and addresses of employees eligible to vote in a representation election should be grounds on which to set that election aside. The Board has not in the past set elections aside on this ground. For, while the Board has required that an employer, shortly before an election, make available for inspection by the parties and the Regional Director a list of employees claimed by him to be eligible to vote in that election, there has been no requirement that this list contain addresses in addition to names. The rules governing representation elections are not, however, "fixed and immutable. They have been changed and refined, generally in the direction of higher standards."[4]

We are persuaded, for the reasons set out below, that higher standards of disclosure than we have heretofore imposed are necessary, and that prompt disclosure of the information here sought by the Petitioners should be required in all representation elections. Accordingly, we now establish a requirement that will be applied in all election cases. That is, within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties

[4] *Sewell Manufacturing Company*, 138 NLRB 66, 70. And see, e.g., *Peerless Plywood Company*, 107 NLRB 427; *Gummed Products Co.*, 112 NLRB 1092; *Hollywood Ceramics Co., Inc.*, 140 NLRB 221; *Dal-Tex Optical Co.*, 137 NLRB 1782, at 1786–7.

pursuant to Section 102.62 of the National Labor Relations Board Rules and Regulations or after the Regional Director or the Board has directed an election pursuant to Section 102.67, 102.69, or Section 102.85 thereof, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.[5]

The considerations that impel us to adopt the foregoing rule are these: "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone."[6] In discharging that trust, we regard it as the Board's function to conduct elections in which employees have

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[5] In the event that the payroll period for eligibility purposes is subsequent to the direction of election or consent-election agreement, the eligibility list shall be filed within 7 days after the close of the determinative payroll period for eligibility purposes. In order to be timely, the eligibility list must be *received* by the Regional Director within the period required. No extension of time shall be granted by the Regional Director except in extraordinary circumstances nor shall the filing of a request for review operate to stay the requirement here imposed.

However, the rule we have here announced is to be applied prospectively only. It will not apply in the instant cases but only in those elections that are directed, or consented to, subsequent to 30 days from the date of this Decision. We impose this brief period of delay to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated.

[6] *N.L.R.B.* v. *Waterman S. S. Corp.*, 309 U.S. 206, 226; see, also, *N.L.R.B.* v. *Shirlington Supermarkets*, 224 F. 2d 649, 651 (C.A. 4).

the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice.[7] Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available.[8] In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed.

As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises,[9] has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view. This is not, of course, to deny the existence of various means by which a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious—that the access of *all* employees to such communica-

[7] See *General Shoe Corporation*, 77 NLRB 124, 126–127.

[8] See Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 46, 92 (1964).

[9] *N.L.R.B.* v. *Babcock & Wilcox*, 351 U.S. 105.

tions can be insured only if all parties have the names and addresses of all the voters.[10] In other words, by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation.

Nor are employee names and addresses readily available from sources other than the employer. The names of some employees may be secured with the assistance of sympathetic fellow employees, but, in a large plant or store, where many employees are unknown to their fellows, this method may not yield the names and addresses of a major proportion of the total employee complement.[11] Additionally, there are not infrequently employees on layoff status, sick leave, leave of absence, military leave, etc., eligible to vote,[12] yet unknown to their fellow employees. Fur-

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[10] A union that does not know the names or addresses of some of the voters may seek to communicate with them by distributing literature on sidewalks or street corners adjoining the employer's premises or by utilizing the mass media of communication. The likelihood that *all* employees will be reached by these methods is, however, problematical at best. See *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128, 130 (C.A. 2), cert. denied 376 U.S. 951. Personal solicitation on plant premises by employee supporters of the union, while vastly more satisfactory than the above methods, suffers from the limited periods of nonworking time available for solicitation (generally and legally forbidden during working time, *Peyton Packing Co.*, 49 NLRB 828, 843), and, in a large plant, the sheer physical problems involved in communicating with fellow employees.

[11] See, e.g., *The May Department Stores Co.*, 136 NLRB 797, 808, enforcement denied, 316 F. 2d 797 (C.A. 6), in which, after some 20 months of organizational effort, the union possessed names and addresses of only 1250 out of approximately 3000 eligible voters.

[12] *Vent Control, Inc.*, 126 NLRB 1134 (layoff); *Otarion Listener Corp.*, 124 NLRB 880 (sick leave); *Channel Master Corp.*, 148 NLRB 1343, (leave of absence); *Brown Cigar Company*, 124 NLRB 1435, 1437, footnote 3, (military leave).

thermore, employees are frequently known to their fellows only by first names or nicknames, so that there may be significant problems in obtaining the home addresses even of those employees whose names are known. Finally, all the foregoing difficulties are compounded by the more or less constant turnover in the employee complement of any employer.[13]

In sum, not only does knowledge of employees names and addresses increase the likelihood of an informed employee choice for or against representation, but, in the absence of employer disclosure, a list of names and addresses is extremely difficult if not impossible to obtain. Accordingly, as we have stated, we shall in the future regard an employer's refusal to make a prompt disclosure of this information as tending to interfere with prospects for a fair and free election.[14]

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[13] See 88 Monthly Labor Review, 1022–1024 (August 1965).

[14] While we have discussed the importance of disclosure in the context of the typical case in which the employer and union are the parties engaged in communicating with the electorate, it should be noted that the requirement here imposed applies equally to the case in which an election has been directed upon a petition by an employee or group of employees who seek to decertify an existing bargaining representative or to rescind that representative's authority to enter into a union-security agreement of the sort otherwise authorized by Section 8(a)(3) of the Act. In these latter cases, the petitioning employees would be entitled to the names and addresses of their fellow employees as an aid in their efforts to communicate their arguments against continued union representation or continuance of an existing union-security agreement. Similarly, the union, as a party to the election, would be entitled to employees' names and addresses so as to communicate its position. In short, the disclosure requirement here adopted applies whenever a Board election has been scheduled and insures all parties to the election, whatever their viewpoint, of an opportunity to communicate with the electorate. The only exception is in the expedited election conducted pursuant to Section 8(b)(7)

A requirement that all participants in an election contest have the opportunity to ascertain the names and addresses of the voters is not uncommon. Lists of registered voters in public elections are open to inspection and copying by the public.[15] When stockholders wish to participate in election contests (or other proxy contests), management either must provide them with the names and addresses of other stockholders or mail campaign material for them.[16] Any candidate for union office is entitled to have the union distribute his campaign literature for all members.[17]

We see no reason why similar opportunities should not be available in a representation election. As one thoughtful commentator has stated, "Since the opportunity for both sides to reach all the employees is basic to a fair and informed election, the reasons for requiring disclosure seem just as strong as those leading to similar requirements under other provisions of the law."[18]

(C). In this situation, we believe that the time span between the direction of election and the conduct thereof is too brief, taking into account the time required for the employer to compile and file a list of names and addresses, for the union to be able to make any meaningful use of this information. Hence, in that limited situation, we do not require disclosure.

[15] 29 C.J.S. Elections §50.

[16] 17 C.F.R. 240. 14a–7, 8.

[17] 73 Stat. 532, 29 U.S.C. § 481(c).

[18] Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 99–100 (1964); Cf. Summers, *Judicial Regulation of Union Elections*, 70 Yale L. J. 1221, 1227–1228 (1961). Another manifestation of the concept that all participants in an election should have access to the electorate is embodied in 49 Stat. 1088, as amended, 47 U.S.C. § 315(a), which provides for equal time for political candidates on radio and television.

While the rule we here announce is primarily predicated upon our belief that prompt disclosure of employee names and addresses is necessary to insure an informed electorate, there is yet another basis upon which we rest our decision. As noted (*supra*, p. [19a]), an employer is presently under no obligation to supply an election eligibility list until shortly before the election. The list, when made available, not infrequently contains the names of employees unknown to the union and even to its employee supporters. The reasons for this are in large part the same as those that make it difficult for a union to obtain, other than from the employer, the names of all employees, i.e., large plants with many employees unknown to their fellows, employees on layoff status, sick leave, military leave, etc. With little time (and no home addresses) with which to satisfy itself as to the eligibility of the "unknowns", the union is forced either to challenge all those who appear at the polls whom it does not know or risk having ineligible employees vote. The effect of putting the union to this choice, we have found, is to increase the number of challenges, as well as the likelihood that the challenges will be determinative of the election, thus requiring investigation and resolution by the Regional Director or the Board. Prompt disclosure of employee names as well as addresses will, we are convinced, eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity. Furthermore, *bona fide* disputes between employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election when the significances of a single vote is apt to loom large in the par-

ties' calculations. Thus, the requirement of prompt disclosure of employee names and addresses will further the public interest in the speedy resolution of questions of representation.

The arguments against imposing a requirement of disclosure are of little force, especially when weighed against the benefits resulting therefrom. Initially, we are able to perceive no substantial infringement of employer interests that would flow from such a requirement. A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret (other than a desire to prevent the union from communicating with his employees—an interest we see no reason to protect). Such legitimate interest in secrecy as an employer may have is, in any event, plainly outweighed by the substantial public interest in favor of disclosure where, as here, disclosure is a key factor in insuring a fair and free election. Cf. *N.L.R.B.* v. *F. W. Woolworth Co.*, 352 U.S. 938, reversing *per curiam*, 235 F. 2d 319 (C.A. 9); *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149; *F.C.C.* v. *Schreiber*, 381 U.S. 279.

The main arguments that have been presented to us by the Employers and the *amici curiae* supporting the Employers relate not to any infringement of *employer* rights flowing from a disclosure requirement but rather to an asserted infringement of *employee* rights. Thus, it is argued that if employees wished an organizing union to have their names and addresses, they would present the union with that information. By compelling the employer to provide the union with information that the employees have chosen not to divulge, the Board, it is asserted, compels employer interference with the Section 7 right of employees to

refrain from union activities. We regard this argument as without merit. An employee's failure to provide a union with his name and address, whether due to inertia, fear of employer reprisal, or an initial predisposition to vote against union representation, is not, as we view it, an exercise of the Section 7 right to refrain from union activity. Rather, in the context with which we are here concerned—a Board-conducted representation election—an employee exercises this right by voting for or against union representation.

Similarly, we reject the argument that to provide the union with employee names and addresses subjects employees to the dangers of harassment and coercion in their homes. We cannot assume that a union, seeking to obtain employees' votes in a secret ballot election, will engage in conduct of this nature; if it does, we shall provide an appropriate remedy.[19] We do not, in any event, regard the mere possibility that a union will abuse the opportunity to communicate with employees in their homes as sufficient basis for denying this opportunity altogether. See *Martin* v. *City of Struthers*, 319 U.S. 141; *Staub* v. *City of Baxley*, 355 U.S. 313.[20]

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[19] See *Poinsett Lumber & Mfg. Co.*, 116 NLRB 1732; *Orleans Mfg. Co.*, 120 NLRB 630, 634; *Plant City Welding and Tank Company*, 119 NLRB 131, 133–134.

[20] Another argument made against disclosure of employee names and addresses in connection with an election proceeding is that a union might petition for an election with no real intention of participating therein, but solely to obtain employee names and addresses, intending, on receipt thereof, to withdraw the election petition and utilize its newly-acquired information as a basis for further organizational efforts. We think that the likelihood of such misuse of the Board's processes is minimized by our practice of requiring at least a 30 percent showing of representation before further processing the usual RC (union) petition, and also by our practice of imposing (absent a showing

The argument is also made (by the Employer in the *Excelsior* case) that under the decisions of the Supreme Court in *N.L.R.B.* v. *Babcock & Wilcox*,[21] and *N.L.R.B.* v. *United Steelworkers (Nutone, Inc.)*,[22] the Board may not require employer disclosure of employee names and addresses unless, in the particular case involved, the union would otherwise be unable to reach the employees with its message. We disagree. We think that the issue presented by these cases is distinguishable from that presented in *Babcock* or *Nutone* and that, even assuming the availability of other avenues by which a union *might* be able to communicate with employees, we may properly require employer disclosure of employee names and addresses so as to *insure* the opportunity of all employees to be reached by all parties in the period immediately preceding a representation election.

Initially, as we read *Babcock* and *Nutone*, the existence of alternative channels of communication is relevant only when the opportunity to communicate made available by the Board would interfere with a significant employer interest—such as the employer's interest in controlling the use of property owned by him. Here, as we have shown, the employer has no significant interest in the secrecy of employee names and addresses. Hence, there is no necessity for

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of good cause to the contrary) a 6-month ban on entertaining an election petition filed by a union which has withdrawn from an election after a hearing has been held or a consent-election agreement approved by the Regional Director. See *Campos Dairy Products, Ltd.*, 107 NLRB 715. In any event, in view of the importance of disclosure for a fair and free election, we do not regard the bare possibility that *some* unions may misuse the information disclosed as grounds for our denying *all* unions (as well as employees who seek to unseat unions, see footnote 14, *supra*) access to employee names and addresses.

[21] 351 U.S. 105.

[22] 357 U.S. 357.

the Board to consider the existence of alternative channels of communication before requiring disclosure of that information. Moreover, even assuming that there is some legitimate employer interest in nondisclosure, we think it relevant that the subordination of that interest which we here require is limited to a situation in which employee interests in self-organization are shown to be substantial. For, whenever an election is directed (the precondition to disclosure) the Regional Director has found that a real question concerning representation exists; when the employer consents to an election, he has impliedly admitted this fact."[23] The opportunity to communicate on company premises sought in *Babcock* and *Nutone* was not limited to the situation in which employee organizational interests were substantial, i.e., in which an election had been directed; we think that on this ground also the cases are distinguishable. Finally, both *Babcock* and *Nutone* dealt with the circumstances under which the Board might find an employer to have committed an unfair labor practice in violation of Section 8 of the Act, whereas the instant cases pose the substantially distinguishable issue of the circumstances under which the Board may set aside an election. "[T]he test of conduct which may interfere with the 'laboratory conditions' for an election is

[23] Section 9(c)(1), NLRA; see, also, Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Sec. 101.18, 29 C.F.R. 101.18. We also require disclosure when an election is directed pursuant to an employee petition to decertify a currently recognized union or to rescind the authority of such a union to enter into a "union-shop" agreement. See footnote 14, *supra*. In these situations, the employee interest, though opposed to union representation or membership, is also required to be substantial before an election will be directed. See Section 9(c)(1)(A)(ii), 9(e)(1), NLRA; Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Section 101.18, 101.27, 29 C.F.R. 101.18, 101.27.

considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)."[24] Whether or not an employer's refusal to disclose employee names and addresses after an election is directed would constitute "interference, restraint, or coercion" within the meaning of Section 8(a)(1) of the Act, despite the existence of alternative channels of communication open to the union, is a question on which we express no view because it is not before us. However, we are persuaded, for the reasons previously stated, that disclosure is one of the "safeguards necessary to insure the fair and free choice of bargaining representative by employees"[25] and that an employer's refusal to disclose, regardless of the existence of alternative channels of communication, tends to interfere with a fair and free election. Thus *Babcock* and *Nutone,* which dealth with the substantially different issue of whether the employers' conduct violated Section 8(a)(1), are, for this reason also, inapposite.

Finally, we wish to state our reasons for rejecting the approaches to the disclosure issue suggested by questions II and III in the Notice of Hearing. We do not limit the disclosure requirement to the situation in which the employer has mailed antiunion literature to employees' homes (question II) because we believe that access to employee names and addresses is fundamental to a fair and free election regardless of whether the employer has sent campaign propaganda to employees' homes.[26] We do not limit the re-

[24] *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787; see also *General Shoe Corporation*, 77 NLRB 124, 126–127.

[25] *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, 330; see also *N.L.R.B.* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226.

[26] Compare *May Department Stores Co.*, 136 NLRB 797, enforcement denied, 316 F. 2d 797 (C.A. 6); *Montgomery Ward & Co.*, 145 NLRB 846, enfd. in part, 339 F. 2d 889 (C.A. 6).

quirement of disclosure to furnishing employee names and addresses to a mailing service (question III) because this would create difficult practical problems and because we do not believe that the union should be limited to the use of the mails in its efforts to communicate with the entire electorate.[27]

Inasmuch as the rule we have here announced is to be applied prospectively only (see footnote 5, *supra*), we reject Petitioners' exceptions to the Regional Directors' recommendations with respect to Objection No. 2 in both *Kellogg* and *Excelsior*. As we have also rejected the Petitioner's remaining exceptions in *Excelsior*, we shall accept the Regional Director's recommendation and certify the results of that election. With respect to *Kellogg*, while we have rejected the Joint Petitioners' exception to the Regional Director's recommendation as to Objection No. 2, the Employer has filed exceptions to the Regional Director's

[27] See *S. & H. Grossinger's, Inc.*, 156 NLRB No. 20. See, also, Eldersveld and Dodge, "Personal Contact or Mail Propaganda: An Experiment in Voting Turnout and Attitude Change" in Katz, *Public Opinion and Propaganda*, 532, 541 (1954); Karsh, *Diary of a Strike*, 106 (1958); Klapper, *The Effects of Mass Media*, pt. 2, pp. 9–14 (1949).

In the briefs and arguments of the Employers and *amici curiae* supporting the Employers, much has been made of Board decisions setting aside representation elections because an employer or his agents called upon all or a majority of employees in their homes in the period preceding the election. See, e.g., *Peoria Plastic Co.*, 117 NLRB 545. The argument is made that it would be inequitable for the Board to preclude employers from visiting employees in their homes and at the same time insist that unions be furnished with employee names and addresses so that they may engage in home visits. The short answer to this argument is that employers are free to communicate with their employees in the plant; a union, as a practical matter, is severely limited in its efforts at in-plant communications. See *Plant City Welding and Tank Co.*, 119 NLRB 131, 133–134; see, also, footnote 10, *supra*.

recommendation that the election be set aside on the basis of two campaign letters sent by the Employer and that a new election be directed. We have read the letters of the Employer in their entirety and the Union's propaganda and conclude that, under all the circumstances, the Employer's letters could clearly be evaluated by the employees as partisan electioneering and do not warrant setting the election aside.[28] Accordingly, we shall also certify the results of that election.

CERTIFICATIONS OF RESULTS OF ELECTIONS

It is hereby certified, in *Excelsior Underwear Inc.* and *Saluda Knitting Inc.,* Case No. 11–RC–1876, that a majority of the valid ballots has not been cast for Amalgamated Clothing Workers of America, AFL–CIO, and that the said labor organization is not the exclusive representative of the employees in the unit herein found appropriate, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

It is hereby certified, in *K. L. Kellogg & Sons,* Case No. 21–RC–8955, that a majority of the valid ballots has not been cast for International Union of Operating Engineers, Local No. 3, AFL–CIO, and International Union of Operating Engineers, Local Union No. 12, AFL–CIO, and that said labor organizations are not the exclusive representative of the employees in the unit herein found appropriate, within the

[28] Member Brown would accept the Regional Director's findings and recommendation.

meaning of Section 9(a) of the National Labor Relations Act, as amended.

Dated, Washington, D.C., February 4, 1966.

[SEAL]

NATIONAL LABOR RELATIONS BOARD,
FRANK W. MCCULLOCH, *Chairman.*
JOHN H. FANNING,
GERALD A. BROWN,
HOWARD JENKINS, JR.,
SAM ZAGORIA, *Members.*

APPENDIX D

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

* * * * * *

SEC. 9. (c)(1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative as defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be con-

ducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

SEC. 10 (b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States * * *.

(c). The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear

argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any

matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

2. The relevant provisions of the Administrative Procedure Act, as amended (60 Stat. 237, 80 Stat. 381, 81 Stat. 54, 5 U.S.C. 551, *et seq.*) are as follows:

SEC. 552. PUBLIC INFORMATION . . .

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public— * * *

* * * * * * *

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. * * *

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SEC. 553. RULE MAKING

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(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are im-

practicable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

APPENDIX E

In the United States Court of Appeals for the Fifth Circuit

No. 24802

HOWELL REFINING COMPANY, PETITIONER,
versus
NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of an Order of the National Labor Relations Board (Texas Case)

August 12, 1968

Before RIVES, GEWIN and THORNBERRY, Circuit Judges

GEWIN, Circuit Judge: Howell Refining Company petitions this court to review and set aside an order of the National Labor Relations Board issued against it on May 10, 1967. The order requires the company to cease and desist from unfair labor practices, to bargain with the Oil, Chemical and Atomic Workers International Union, and to post appropriate notices. The Board cross-petitions for enforcement of its order. We deny enforcement and remand the case for further proceedings.

To place the questions presented in context we shall summarize the events leading up to the Board's May 10 order. On March 23, 1966, the union filed a representation petition with the Board requesting certification as the bargaining agent for a unit consisting of all truck and transport drivers, truck and auto mechanics, and production and maintenance employees in the company's San Antonio and Corpus Christi, Texas, plants. The company contended that separate units at each of the two plants were appropriate. Following a hearing the Regional Director determined that the multi-plant unit requested in the union's petition was warranted. The company also objected to the exclusion from the bargaining unit of certain clerical employees, but the Regional Director resolved this issue in favor of the union also. The company promptly requested that the Board review the Regional Director's decision, urging the appropriateness of separate units and the inclusion in each unit of the clerical employees. The Board denied the request on the ground that it "raised no substantial issues warranting review except as to the unit placement of yield clerks." Consequently, the Regional Director's decision was amended to permit yield clerks to vote subject to challenge.

An election in June resulted in a union victory, thirty-eight votes being cast for the union, eighteen against the union, and four challenged ballots. The company filed timely objections to the election, alleging that conduct attributable to the union had improperly influenced its outcome. It also objected again to the Regional Director's determination of the appropriate unit. Additionally, the company attacked the "names and addresses" rule established by the Board in *Excelsior Underwear, Inc.*[1] After conducting an ad-

[1] 156 N.L.R.B. No. 111, 1966 CCH NLRB ¶ 20,180.

ministrative investigation, the Regional Director issued on August 19, 1966, a Supplemental Decision, Order and Certification of Representative in which he overruled the company's objections and certified the union as the exclusive bargaining representative. In September the company filed timely objections to the supplemental decision, contending that the Regional Director's rulings were erroneous and that, in any event, a formal hearing on the objections had been improperly denied. On November 3, 1966, the Board denied the company's request on the ground that it raised no substantial issues warranting review.

Despite the certification by the Board, the company refused to recognize or bargain with the union. On December 15, 1966, in response to the union's charges, a complaint issued against the company alleging violations of section 8(a) (1) and (5) of the National Labor Relations Act.[2] In its answer the company attacked the validity of the certification and again denied the appropriateness of the bargaining unit. General Counsel filed a motion for summary judgment on the ground that the company's answer had raised no triable issues of fact. In its answer in opposition to the motion, the company reasserted the invalidity of the union certification and attached copies of documents and other evidence previously submitted in the representation proceedings. In addition, the company stated that it had been bargaining with the union in good faith since January 16, 1967, and proposed that the disposition of the motion be suspended pending the outcome of negotiations. The union opposed the request on the ground that the company had not recognized it as the certified representative of the employees. The General Counsel also opposed the request on the basis that occurrences sub-

[2] 29 U.S.C. § 158(a) (1), (5) (1964).

sequent to December 1966 were irrelevant to the issues presented by the complaint.

The Trial Examiner found that the case was not mooted by subsequent negotiations between the parties. He further concluded that the issues raised by the company had already been decided in the representation proceeding; that he was bound by those determinations; and that, consequently, no hearing was necessary in the absence of newly discovered or previously unavailable evidence. Accordingly, the Examiner found that the company had violated section 8(a) (1) and (5) of the Act, and granted the motion for summary judgment. The Board affirmed the Examiner's ruling, adopted his finding that the company had violated the Act by refusing to recognize and bargain with the union, and issued the order which the company now seeks to set aside.

The company contends that the Board's order should be vacated because (1) the Board abused its discretion in determining that a multi-plant unit was appropriate; (2) the Board erred in failing to find that the disclosure of the names and addresses of employees to the union invalidated the election; (3) the Board erred in failing to find that the union and its supporters engaged in preelection conduct that rendered a free expression of choice impossible; and (4) the Board's refusal to grant a post-election hearing on the company's claim of unlawful union conduct constituted a denial of due process.

We have given careful consideration to each of the above contentions and we have reviewed the entire record. We find no abuse of discretion in the Board's determination that a multi-plant bargaining unit is appropriate. We also find that the submission by the company of employees' names and addresses as required by the *Excelsior* rule does not invalidate the

election. However, we do not reach the question of whether there was interference with the free choice of the employees because we conclude that this question should not have been decided by the Board summarily and that the company should have been granted a hearing. Consequently, the order of the Board is set aside and the case is remanded to the Board for a hearing on the company's claim that conduct attributable to the union generated such an atmosphere of fear, concern, and confusion among the employees that a free expression of choice in the election was rendered impossible.

* * * * *

II

The company contends that the election should have been set aside because it was forced, under protest, to comply with the Board's *Excelsior* rule. This rule requires employers to file with the Regional Director a list containing the names and addresses of all employees eligible to vote in the election. The Regional Director then makes the list available to all parties involved in the election. The company's primary contention is that the disclosure of this information afforded the union an unfair and inequitable opportunity to propagandize through home visitation and made possible certain alleged coercive conduct on the part of the union.[*]

The Board's *Excelsior* rule was adopted to guarantee all participants in the election access to the electorate and to ensure an informed electorate. The rule eliminates the time-consuming process of investigating challenges to voter eligibility on the eve of elections

[*] The alleged improper conduct of the union is discussed in part III of this opinion.

solely because of a lack of knowledge of voters' identity.[7] We find the rule to be a valid exercise of the Board's power to ensure employees a fair and free choice in the selection of their representative.[8] The possibility that the union or its supporters abused the opportunity of communicating with the employees in this case is insufficient, in our opinion, to invalidate the *Excelsior* rule or to set aside the election.[9]

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[7] Excelsior Underwear, Inc., 156 N.L.R.B. No. 111, 1966 CCH NLRB ¶ 20,180.

[8] *See* NLRB v. Rohlen, 385 F.2d 52 (7 Cir. 1967); NLRB v. Hanes Hosiery Div., 384 F.2d 188 (4 Cir. 1967), *cert. denied*, 390 U.S. 950 (1968). Although the company does not raise the point, the *Excelsior* rule has been held invalid in the First Circuit because of the manner of its adoption. Wyman-Gordon Co. v. NLRB, ——— F.2d ——— (1 Cir. 1968) [No. 7000, June 12, 1968] (two-to-one decision). We take a different view of the matter and decline to follow the *Wyman-Gordon* case.

[9] See NLRB v. Duncan Foundry & Mach. Works, Inc., 7 Cir. 1968, ——— F.2d ——— [No. 16672, January 16, 1968].

U.S. GOVERNMENT PRINTING OFFICE: 1968